9th Cir. Ct.
No. 77-1720

77-1498

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

RICHARD TAXE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Appeal from the United States District Court for the Central District of California, and from the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

MORRIS LAVINE
617 South Olive Street
Suite 510
Los Angeles, California 90014
(213) 627-3241

Attorney for Petitioner

Of Counsel:

JOAN CELIA LAVINE
617 South Olive Street
Los Angeles, California 90014
(213) 627-3241

9th Cir. Ct.
No. 77-1720

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

RICHARD TAXE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Appeal from the United States District Court for the Central District of California, and from the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

MORRIS LAVINE
617 South Olive Street
Suite 510
Los Angeles, California 90014
(213) 627-3241

Attorney for Petitioner

Of Counsel:

JOAN CELIA LAVINE
617 South Olive Street
Los Angeles, California 90014
(213) 627-3241

TOPICAL INDEX

APPENDICES

TABLE OF AUTHORITIES CITED

Constitution

Statutes

Rules

9th Cir. Ct.
No. 77-1720

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

RICHARD TAXE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Appeal from the United States District Court for the Central District of California, and from the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE WARREN BURGER, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Richard Taxe, respectfully petitions this Honorable Court for a Writ of Certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse orders denying modification

of judgments under Rule 35 of Federal Rules of Criminal Procedure for the District Courts of the United States on the grounds that the judgments, and each of them, are illegal and violate the Eighth Amendment to the Constitution of the United States in that they are cruel and unusual punishment, and impose illegel sentences of imprisonment and excessive fines forbidden by the Eighth Amendment.

The Eighth Amendment to the Constitution of the United States forbids cruel and unusual punishment, and excessive bails and excessive fines, to which the Petitioner was subjected.

Although the Copyright Act of 1971 provides that infringement of copyright is a misdemeanor punishable by a maximum of one year in jail and/or a fine of $1,000.00, the court imposed a prison sentence of four years, and five years probation, and a $1,000.00 fine on twenty-two (22) counts, or a total of $26,000.00, for a first offender.

It is necessary for this Court to grant certiorari to determine important questions of criminal law in connection with the construction and application of the Eighth Amendment to the Constitution of the United States, relating to cruel and unusual punishments and excessive fines, and forbidding them, as inherently, and as construed and applied in this case. (Morrissey v. Brewer, 408 U.S. 471, 33 L.ed.2d 484; In re Gault, 387 U.S. 1, 18 L.ed. 2d 527; Fuentes v. Shevin, 407 U.S. 67, 32 L.ed.2d 556; Goldberg v. Kelly, 397 U.S. 254, 263, 25 L.ed.2d 287, 296.)

JURISDICTION

Jurisdiction is conferred by Section 1254 of Title 58, U.S. Codes, and by Rule 23 of the Rules of the Supreme Court.

The Court of Appeals rendered its judgment on this Rule 35 motion on February 15, 1978; and a petition for rehearing was duly and timely filed, and was denied on March 27, 1978.

A copy of the Opinion of the Court of Appeals, rendered on February 15, 1978, is attached hereto as Appendix "A" and made a part hereof; and a copy of the Order denying the petition for rehearing is attached hereto as Appendix "B" and made a part hereof.

ISSUES

I.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are the Fifth and Eighth Amendments to the Constitution of the United States; and Title 17, U.S. Code, Section 104 (penal provisions of the Copyright Act of 1971); and Rule 35 of Federal Rules of Criminal Procedure for the District Courts of the United States.

The constitutional provisions and the relevant statute, and Rule 35 are attached hereto as Appendix "E".

II.

QUESTIONS PRESENTED

1. Whether the trial court imposed an illegal sentence on the Petitioner in imposing multiple punishments and multiple fines unauthorized by Title 17, U.S. Code, Section 104, and was therefore in violation of the Eighth Amendment to the Constitution of the United States because his alleged violation constituted

a course of conduct and not separate criminal violation, and therefore could only be punished as a single violation, a misdemeanor, with a maximum of one year's imprisonment and/or a fine of $1,000.00

2. Whether the violations charged under the criminal law and Title 17, U.S. Codes, Section 104, can be treated as they would be treated in a civil context as separate criminal violations, or are they barred because of the language of Section 104, Title 17, U.S. Codes, making copyright infringement a misdemeanor in which the maximum punishment cannot be exceeded over one year, or by a fine not less than $100.00 or no more than $1,000.00, or both.

3. Were the mail fraud charges, based on selling the tapes for profit as required by the Copyright Act, Section 104, merely another unit of the alleged tape recording violations split up by the government to give Petitioner additional, multiple punishment in a single course of conduct? U.S. v. Universal C.I.T. Credit Corp., 314 U.S. 218, 97 L.ed. 260.

4. Whether fines of $26,000.00 are void and illegal as excessive and not authorized by Title 17, U.S. Codes, Section 104, the Copyright Act.

5. Was the sentence in excess of one year and $1,000.00 fine illegal under the provisions of the Eighth Amendment to the Constitution of the United States?

5. Were the sentences imposed in this case in violation of the principle laid down by this Court in United States v. Universal C.I.T. Credit Corp., 314 U.S. 218, 97 L.ed. 260, which case involved 32 counts of violation of the Minimum Wage Act, and which this Court held constituted a single course of conduct and a single offense, rather than separate items that constituted the punishable charged offense.

6. Whether the law of copyright in Section 104, of Title 17, U.S.C., was unconstitutionally applied, in violation of the Fifth Amendment to the Constitution of the U.S. in that the statute only permits punishment of a maximum of one year imprisonment and/

or a $1,000.00 fine, and not four years imprisonment and a $26,000.00 fine. The statute fails to give adequate notice of its extent and purpose as enacted, and fails to set forth punishment as was unusually fixed in this case.

7. Whether the legislative intent behind the Sound Recording Act of 1971 was to punish for "a course of conduct and be treated as a single offense, a misdemeanor."

8. Whether the Court of Appeals misstated the facts on which it relied for its opinion.

THE FACTS

Richard Taxe was convicted of 20 counts of willful infringement of copyrights for profit, 17 U.S.C., Sections 1(f), 101(e), 104; one count of conspiracy, 18 U.S.C., Section 371; and 5 counts of mail fraud, 18 U.S.C., Section 1341. He received concurrent four-year sentences of imprisonment and a $1,000.00 fine on each of the mail fraud counts. He was sentenced to one year's imprisonment and a $1,000.00 fine for the conspiracy count and each of three of the willful infringement counts, with time to run concurrently with the mail fraud counts. On the remaining counts, he was fined $1,000.00 each, and additionally was placed on five years' probation.

Richard Taxe was taken to Terminal Island Federal Correction Institution to serve his sentence. The trial court arbitrarily committed him and refused to allow him to surrender to the institution directly.

The Petitioner had never been in any trouble before, had never been charged with any other criminal offense, and thought he had found a legal way to make 8-track stereo tape recordings

from records purchased on the open market. With specially adapted electronic tape equipment, the commerically acquired records or tapes were re-recorded with various alterations, in which the recording speed was increased or decreased, reverberations or echo was introduced, certain portions of the musical sounds were eliminated or reduced in volume or sound, and additional sounds were produced by synthesizers. The Petitioner had legal advice from an attorney that the alterations changed the music so that there was no violation. The trial court, however, gave an instruction that advice of an attorney was not a defense, even though he may have relied on advice of counsel. (See OPINION serving Court on original Appeal, Headnote 26, 540 F.2d 964.)

Taxe's case was argued and affirmed on appeal, the Circuit Court noting numerous errors, one of which was that the trial court, in addition to all other punishments, ordered the Petitioner to pay for the costs of the criminal trial. After the Opinion of the Court of Appeals came down, 540 F.2d 961, cert. denied, 429 U.S. 1040, the trial court struck that part of the Judgment ordering the Petitioner to pay costs of trial and let the rest of the sentences stand.

Petitioner, through his present counsel, made a motion attacking the Judgment as a violation of Rule 35, Federal Rules of Criminal Procedure for the District Court, and a violation of the Fifth and Eighth Amendments to the Constitution of the United States. The Court, at first, considered the motion in chambers and ruled against the Petitioner without any hearing, but on Petitioner's objection that he had a right to be heard, the Court allowed him five (5) minutes to present his points. On appeal, the Court of Appeals affirmed the judgment of the trial court, misstating some of the facts, and some not in the record.

The Court of Appeals erred in saying that Petitioner was "a key figure in a $1,000,000 recording scheme." This was a misstatement of facts and is not supported by the trial record, or any other record, and is untrue. Furthermore, the trial judge did not permit any evidence of any monetary amount involved in the transactions to be admitted (See typewritten Opinion of the Court of Appeals, page 3, lines 1 and 2.)

The Court of Appeals also referred to the sentence of a Gilbert Henslee, as a co-defendant of this Petitioner. Henslee was not a co-defendant, but was another defendant in another copyright case, at a later date before the same judge, who had pleaded guilty and received a disproportionate shorter sentence in relation to a similar case before the same judge, showing that inferentially he had received a lighter sentence after pleading guilty, without a trial, to a felony; whereas the Petitioner had insisted on standing trial before a jury.

ARGUMENTS

Nothing is mentioned in the section on punishment on the conduct involved herein that could make it more than one offense, and it is reasonable inference that Congress had no such intent because it did not specify such a penalty or punishment. (See U.S. v. Evans, 333 U.S. 483, 486, 92 L.ed. 823, 826; Bell v. United States, 349 U.S. 81, 82, 99 L.ed. 909; U.S. v. Universal C.I.T. Credit Corp., 344 U.S. 215, 97 L.ed. 260; Prince v. United States, 352 U.S. 322, 1 L.ed.2d 379; Ex parte Snow, 120 U.S. 273, 282; Weems v. United States, 217 U.S. 349, 54 L.ed. 793; U.S. v. Kissel, 218 U.S. 601, 54 L.ed. 1163; Brown v. Elliott, 225 U.S. 392, 56 L.ed 1136; Braverman v. United States, 317 U.S. 49, 87 L.ed. 25.)

In Bell v. U.S., 349 U.S. at 81, the Court said:

"The punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly the Eighth Amendment. Congress could no doubt make the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported. The question is: did it do so? It has not done so in words in the provisions defining the crime and fixing its punishment."

Later on, in the Opinion, the Court said:

"When Congress has the will it has no difficulty in expressing it -- when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a 'harsher punishment'." (Bell v. U.S., 349 U.S., at 82-84, 99 L.ed. at 910.)

This is the complete answer to the government's argument and the Court's opinion that the acts charged against Petitioner should be treated as they would be treated in a civil

context, Congress had no lack of words or ability to say so if it had intended to do so. The fact that it has not done so, and has labeled the offense of copyright violation a misdemeanor, shows clearly that Congressional intent was to regard the offense as subject to a maximum misdemeanor punishment, either in the imprisonment imposed or the fine imposed.

In Furman v. Georgia, 408 U.S. 238, 33 L.ed. 2d 402, is states:

"Third, a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose. (Weems v. United States, supra.) The decisions previously discussed are replete with assertions but one of the primary functions of the cruel and unusual punishments clause is to prevent excessive or unnecessary penalties, citing cases . . ."

The Opinion later goes on to say:

"It should also be noted that the 'cruel and unusual' language of the Eighth Amendment immediately follows the language that prohibits excessive bail and excessive fines. The entire thrust of the Eighth Amendment is, in short, against 'that which is excessive.'"

Again, quoting Furman v. Georgia, 408 U.S. 238, at 249, the Court said:

"Mr. Justice Field, dissenting in O'Neil v. Vermont, 144 US 323, 340, 36 L Ed 450, 458, 12 S Ct 693, said: 'The State may, indeed, make the drinking of one drop of liquor an offense to be punished by imprisonment, but it would be an unheard-of

"cruelty if it should count the drops in a single glass of liquor and make thereby a thousand offences, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration. What the legislature may not do for all classes uniformly and systematically, a judge or jury may not do for a class that prejudice sets apart from the community.'"

It is unbelievable that Congress had any intent to stack up the punishment for a misdemeanor and to let the court make them, in effect, a felony, and enable the court to stack up punishment, even to the extent of life imprisonment for a misdemeanor. It is hard to believe that Congress did not regard copyright infringement by tape recording similar to newspaper publications in a libel case in which the paper publishes many thousands of copies of the newspaper, and is regarded generally as a course of operation, and could not be split up into diverse and numerous prosecutions not spelled out by Congress.

This is exactly what happened in the case of the Petitioner, whose punishment was stacked up by the judge in piling up four misdemeanor sentences to exceed the punishment which Congress has provided for copyright infringement, and to impose a fine of $1,000.00 for each of 22 counts, or a total of $26,000.00. No where have we been able to find, nor has the government pointed out any criminal case involving the alleged copyright infringement with such an excessive penalty and fines. We respectfully submit that they violate the clear mandate of the Eighth Amendment to the Constitution of the United States, and call for this Court granting a Writ of Certiorari and

reversing the same as an illegal sentence and illegal fines, beyond what the Congress has publically noticed as the penalty for alleged copyright infringement.

Copyright, in the strict sense of the term, is purely a statutory right. (18 C.J.S. 161) Congress has provided adequate remedies. It has authorized injunction proceedings and civil damage suits for infringement, as well as misdemeanor criminal punishment and fines in case of criminal prosecution. The Respondent has cited only civil cases respecting copyright infringement, and the Courts in the civil cases have not awarded any amounts such as the judge in this case in the criminal trial of six weeks. Leo Feist v. Apollo Records, 300 F.Supp. 32, awarded plaintiffs a total royalty of $1,096.58 (300 F.Supp. 43). This involved the use of such well-known musical compositions as, "Five Foot Two, Eyes of Blue (Has Anybody Seen My Girl?)," "Honey," "Toot Toot, Tootsie! (Goo'-Bye)," "Margie," "I Can't Give You Anything But Love," "Diga Diga Doo," "When You're Smiling (The Whole World Smiles With You)," "If You Knew Susie (Like I Know Susie)," "Goody Goody," and "Lazy River."

It is interesting to note that Respondent has not cited a single criminal case involving copyright violation where the punishment has been stacked and extended, as was done in this case before the Circuit Court. A federal criminal statute is not to be construed as creating multiple offenses simply because the prohibited criminal act has multiple objects. This has extended the application of the statute beyond its clearly intended scope, and the notice to which the statute gives to the public as to the punishment in the event of a violation of it. Due process mandates the right to notice and a hearing. (In re Gault, 387 U.S. 1, 18 L.ed.2d 527; Fuentes v. Shevin, 407 U.S. 67, 32 L.ed.2d 556.

In United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 97 L.ed. 260, the Court said that the offense made punishable under the Fair Labor Standards Act is a course of conduct. A single offense is committed by all violations that arise from the singleness of thought, purpose, or action which may be deemed a single "impulse." The Court said (344 U.S. at 223):

> "The offense made punishable under the Fair Labor Standards Act is a course of conduct. Such a reading of the statute compendiously treats as one offense all violations that arise from that singleness of thought, purpose, or action, which may be deemed a single 'impulse,' a conception recognized by this Court in the Blockburger Case, supra (284 US at 302), quoting Wharton, Criminal Law 11th ed, Section 34. Merely to illustrate, without attempting to rule on specific situations: a wholly unjustifiable managerial decision that a certain acitvity was not work and therefore did not require compensation under F.L.S.A. standards cannot be turned into a multiplicity of offenses by considering each underpayment in a single week or to a single employee as a separate offense." (United States v. Universal C.I.T. Credit Corp., 344 U.S. at 224, 97 L.ed. at 265.)

In Ex parte Lorenzo Snow, 120 U.S. 273, the Court held that cohabiting with seven women over a period of 35 months was in continuing offense and that a Grand Jury and the prosecutor cannot divide a continuous offense into arbitrary parts and call each part a separate offense and find separate indictments therefor. The Court said it was inherently a continuous offense having duration and not an offense

consisting of an isolated act. The Court held that there could be only one offense and one punishment criticizing the punishment attempted of two years and 11 months as wholly arbitrary, the Court said there might have been imprisonment for 17 and one-half years and fines amounting to $10,500.00, or even an indictment covering every week with imprisonment for 74 years and fines amounting to $44,400.00, and so on, ad infinitum for smaller periods of time. The Court said:

> "It is to prevent such an application of penal laws, that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purposes of indictment or prosecution, prior to the time the prosecution is instituted." (Ex parte Snow, 120 U.S. 273, 282.)

In Prince v. United States, 352 U.S. 322, 1 L.ed.2d 370, the Supreme Court of the United States held that the crime of entering a bank with the intent of committing a robbery was merged with the crime of robbery, when the latter was consummated. The Court pointed out that the Congress had made no indication that it intended to pyramid the penalties.

In Weems v. United States, 217 U.S. 349, the Court held punishment inflicted on a public official for the alleged falsification of an official document ranging from 12 years and one day to 20 years was cruel and unusual punishment such as to shock the conscience and reason of man, the prisoner being subject as accessories to the main punishment, to carrying, during his imprisonment, a chain at the ankle, hanging from the wrist, to deprivation during the term of imprisonment of civil rights, and to perpetual absolute disqualification to enjoy political

rights, hold office, etc., and to surveillance of the authorities during life. (Weems v. United States, 317 U.S. 349, 54 L.ed. 793.)

Four indictments were returned, the last one being No. CR 74-800, filed May 29, 1974, Clerk's Transcript No. 1026, the indictment charges and splits up the alleged offenses into three categories. Count One charges conspiracy, which encompasses all of the acts charged, and Count One further charges manufacture and sale, without authorization, of copyrighted sound recordings. Counts Two to Twenty-One, inclusive, charges the alleged duplication of copyrighted tapes and the advertisement for sale of these tapes throughout the nation. Counts Twenty-Two to Twenty-Six charged the obtaining of money by false and fraudulent pretenses in the sale of the tapes through the United States Mail.

When the unlawful agreement contemplates bringing to pass a continuous result requiring continuous cooperation of the conspirators, the conspiracy is said to be continuing, but it is nevertheless single. (United States v. Kissel, 218 U.S. 601, 54 L.ed. 1168; Brown v. Elliott, 225 U.S. 392, 56 L.ed. 1136.)

Unless it be claimed that there were separate agreements for such purposes, separately reached or arrived at, the conspiracy is still single and not several, however multifarious the purpose. (State V. Profita, 114 NJL 334, 176 A. 683; Brown v. State, 130 Fla. 479, 178 So. 153.)

Multiplicity of purposes in a conspiracy does not create several conspiracies. (Frohwerk v. United States, 249 U.S. 204, 63 L.ed. 561; United States v. Manton, 107 F.2d 834, CCA 2d, 1935; Short v. United States, 91 F.2d 614, CCA 4th; Powe v. United States, 11 F.2d 598, CCA 5th; Miller v. United States, 4 F.2d 228,

CCA 7th, writ of certiorari denied in 268 U.S. 692, 69 L.ed. 1160; Murphy v. United States, 285 F. 801, CCA 7th; United States v. Anderson, 101 F.2d 325, CCA 7th; Blockbur[illegible] v. United States, 284 U.S. 299, 76 L.ed. [illegible] Albrecht v. United States, 273 U.S. 1, 71 L.ed. 505 (distinguished).

Where the several counts of the indictment were conceded by the Government at the trial to charge the illegal objects of one continuing conspiracy, where the proof discloses but one such conspiracy. Punishment, therefore, to be lawful, can only be on a basis compatible with the theory of the case as tried.

The imposition of a sentence of eight years on the theory of seven separate offenses was contrary to that theory upon which the case was submitted to the jury, and it amounts to an unconstitutional "splitting" of the offense for purposes of punishment, and sentences this Petitioner on a theory of culpability for which he was never tried. (Braverman v. United States, 317 U.S. 49, 87 L.ed 25.)

PUNISHMENT

Under the view that only a single conspiracy can be predicated upon a single agreement to commit several separate and distinct substantive offenses, it has been held that where a criminal prosecution or a conviction for violation of a statute penalizing a conspiracy was based upon such an agreement, no sentence of more than the maximum penalty for a single violation of the conspiracy statute could be validy imposed. (Braverman v. United States, 317 U.S. 49-55; Murphy v. United States, 285 F. 801, CCA 7th (1923), writ of certionari denied, 261 U.S. 617, 67 L.ed. 829), (where upon rehearing, the court held that where the evidence establish a single agreement to rob the mails and to

conceal the mailbag and proceeds thereof, only a single conspiracy was established, with the result that cumulative sentences upon conviction of two conspiracies constituted improper double punishment for the same offense); Miller v. United States, 4 F.2d 228, CCA 7th (1925), writ of certiorari denied, 268 U.S. 692, 69 L.ed. 1160; Bertsch v. Snook, 36 F.2d 155, CCA 5th (1929); United States v. Mazzochi, 75 F.2d 497, CCA 2nd (1935); United States v. Anderson, 101 F.2d 325, CCA 7th (1939), 307 U.S. 625, 83 L.ed. 1502-1509; Moss v. United States, 132 F.2d 875, CCA 6th (1943); Sprague v. Aderholt, 45 F.2d 790, DC Ga (1930); Ex parte Rose, 33 F.Supp. 941, DC Mo (1940); In re Nichols, 82 Cal.App. 73, 255 P. 244 (1927); People v. Marks, 83 Cal.App. 370, 257 P. 92 (1927); Com. v. Williams, 102 Pa Super.Ct. 216 (1930), 156 A. 711; Com. v. Berman, 119 Pa Super.Ct. 315 (1935) 181 A. 244.)

Thus, where only a single agreement to violate various separate and distinct Internal Revenue Laws of the United States was charged and proven, such agreement being punishable as a criminal conspiracy under Section 37 of the Criminal Code, 18 USCA, Section 88, 7 FCA Title 18, Section 88, and where, upon a conviction on several counts in the indictment, each charging a conspiracy to violate a separate and distinct Internal Revenue law of the United States, the defendant was sentenced to more that the maximum penalty for this single offense, the judgment of conviction was reversed on certiorari in Braverman v. United States (317 U.S. 49-55, 87 L.ed. 23), and the cause was remanded to the District Court with directions to impose upon the defendant a sentence for but one violation of the conspiracy statute.

Likewise, where two counts in consolidated indictments were the same, except for the concluding clause, each alleging that the defendant

within a certain period conspired to buy and sell unlawfully imported drugs, and differing only as to the way in which the sales were to be executed, and the defendants, upon a plea of guilty, were convicted to the maximum sentence on each count to be served consecutively, the sentences were reduced in United States v. Mazzochi (75 F.2d 497, CCA 2nd 1935), to the maximum sentence for a single count.

While the act of stealing alcohol from a warehouse might be prosecuted and punished separately from the act of transporting the alcohol elsewhere, if under different statutes defining and penalizing the several acts, a single conspiracy, if covering the entire transaction, was held in Miller v. United States, (4 F.2d 228, CCA 7th (1925), 268 U.S. 692, 69 L.ed. 1160), was not to warrant separate and cumulative penalties, one under a count charging a conspiracy to transport the alcohol from the warehouse, and another second count, charging a conspiracy to aid and abet in the removal of the said alcohol.

The remedy of habeas corpus was held in Sprague v. Aderholt, 45 F.2d 790, DC Ga (1930), to be available to a prisoner who, upon his plea of guilty, had been sentenced to three cumulative terms, each of two years' imprisonment, on three counts of an indictment for offenses of conspiracy, each of these counts charging a conspiracy on the same date to commit an offense against the United States; the first conspiracy charged being one to use the mails to defraud a husband out of certain valuable shares of stock; the second, one to use the mails to defraud his wife out of certain stock owned by her; and the third, one to obtain by fraud from the mail two registered letters containing these shares of stock. The prisoner having served more than two years of his sentence, the court ordered him discharged,

on the ground that this was a clear case of double punishment and that the two terms of two years each, following the first one, were void because there was but one conspiracy to commit several offenses.

To the same effect is Ex parte Rose, 33 F. Supp. 941, DC Mo (1940), and where the record showed beyond a doubt that, "it was all one act and one conspiracy."

Also to the same effect is Bertsch v. Snook, 36 F.2d 155, CCA 5th (1929), where the defendant, upon his plea of guilty, was convicted of a charge of conspiracy to assault any persons having charge, control, or custody of any mail matter, and also a charge of conspiracy to rob, steal, and purloin any mail matter, and, having been sentenced to imprisonment of two years on each of two counts, to run consecutively, had served two years.

Counsel for Respondent maintains that the sentence imposed was not illegal because it was within the limits prescribed by the relevant Federal statute, but he does not admit or discuss or meet our challenge that the sentences imposed in this case violated the Eighth Amendment to the Constitution of the United States, which reads as follows:

> "Excessive bail shall not be required, nor execessive fines imposed, nor cruel and unusual punishments inflicted."

Violation of the Eighth Amendment is also a violation of the Fifth Amendment through the Due Process Clause (see Footnote 33 L.ed.2d 360).

Our attack encompassed the sentences on the entire case, not only the copyright violation, but the alleged mail fraud and making and sales of tapes. It was all a one continuous

operation on which Congress did not spell out separate punishment.

Punishment is a part of the definition of crime. Crimes are defined, and penalties are imposed, by Congress, in which such power has been vested. A prohibited act does not constitute a crime unless the statute provides a punishment. (People v. McNulty, 93 Cal. 427, 439; Matter of Ellsworth, 165 Cal. 677, 681, Clark and Marshall, pp. 36, 53.)

Due process of law requires that a criminal offense spell out the charge and the punishment, and the Sixth Amendment to the Constitution of the United States requires that the charge sets forth the nature and cause of the accusation to which the law affixes specified penalties. The notice contained in the Copyright Act is that infringement is punishable by a maximum of one year's imprisonment and/or a maximum of $1,000.00 fine. The word "unusual" contained in the Eighth Amendment fits the sentences imposed in this case, signifying something different from that which is generally done. (See Footnote 32, in Trop v. Dulles, 2 L.ed.2d 641.)

The Appellee has given strong supporting argument in the Court of Appeals to our position, and, in his Brief, in pointing to the fact that in the numerous cases cited by him of multiple copyright infringements were all treated in the civil context, and not as crimes. (Appellee's Brief, pages 8-9.) Respondent has not cited a single criminal case which matches the unusual and cruel punishment imposed in this case which squarely fits the application of the Eighth Amendment to the Constitution of the United States, nor have we been able to find any case of copyright infringement in which the sentence exceeded the one year's provision of the Copyright Act, nor the actual imposition of fine in excess of $1,000.00.

The defendant was sentenced on August 16, 1974. The trial court certainly did not have in mind that the case would serve as a strong deterrent or that it did have such effect, for on the 27th day of August, 1975, the same Court and Judge sentenced Gilbert Henslee, a second offender in No. CR-75-698-IH, to nine months' imprisonment suspended, to spend the first 30 days in jail, and pay a fine of $10,000.00. Henslee was charged and indicted sixteen counts, including wilful infringement of copyrights for profit and interstate transportation of counterfeit sound recordings. The trial court in the Henslee case, apparently treated the sixteen counts as one operation. Henslee was not a co-defendant of the Petitioner herein, and was not in any way connected with this Petitioner. Therefore, the difference in treatment of the Petitioner and Henslee shows that the Petitioner was invidiously discriminated against, and this Court should set aside the judgments as to this Petitioner as being in violation of the Eighth Amendment of the Constitution of the United States. The sentences imposed also violated the Due Process Clause and the Equal Protections Clause of the Constitution of the United States.

The Petitioner was entitled to rely on the notice contained in the statute as to the punishment allowable for its violation. The sentences imposed on the Petitioner are so greatly disproportionate to the offense in that it does not give adequate notice of the punishment to deter others of the offense, and said punishment is completely arbitrary and shocking to the sense of justice. Furman v. Georgia, 408 U.S. 238, 33 L.ed.2d 346.

It is discussed in People v. Stephens, 79 Cal. 428,432, where the Court said:

> "Although when a man has done a criminal act the prosecutor may carve as large an offense out of the transaction as he can, yet he is not at liberty to cut but once. Here the essential ingredient of the offense was the publication of an article containing several alleged libels. There was but one criminal offense, and that cannot be split up and prosecuted in parts without violating the rule of law. 'That a man shall not be twice vexed for one and the same cause.'"

A misdemeanor, under Federal Statute, is an offense which may be punished by imprisonment for a term not exceeding one year. (Armenta v. U.S., 48 F.2d 568.) The imposition of a four-year sentence for alleged copyright violations, violated both the Fifth and Eighth Amendments to the Constitution of the United States, and the splitting up of the course of conduct by Petitioner into separate and additional sentences, plus a fine of $1,000.00 for each additional act, or a total fine of $26,000.00 is harassment and cruel and unusual punishment not in contemplation of Congress in enacting the copyright laws.

CONCLUSION

WHEREFORE, Petitioner prays that this Honorable Court grants certiorari and will decide an important question of criminal law relating to single and multiple punishment for an offense contrary to the express language of Title 17, U.S. Codes, Section 104, and contrary to the provisions contained in the Fifth and Eighth Amendments of the Constitution of the United States. We further pray that

the Court shall hold that the punishment inflicted on this Petitioner, a first offender, was cruel and unusual punishment, and the excessive fine of $26,000 is not in keeping with what Congress had intended. That the Copyright Act violation is a course of conduct subject only to a single punishment and that the additional fines and punishments are in violation of the maximum provided for in Title 17, U.S. Codes, Section 104.

Petitioner prays that this Court determine that a criminal statute must give the public due notice of all of the punishment which a violation of the statute would cause, and that Title 17, U.S. Codes, Section 104, only notifies the public that a copyright violation carries a maximum sentence of one year in jail and/or a fine of $1,000.00, or both, as a misdemeanor.

We further pray that this Court reverse the judgments below pursuant to Rule 35, Rules of Criminal Procedure for the District Court, as illegal and void sentences under the provisions of the Eight Amendment to the Constitution of the United States.

Respectfully submitted,

/s/ Morris Lavine
MORRIS LAVINE

Attorney for Petitioner

Of Counsel:

JOAN CELIA LAVINE

APPENDIX "A"

F I L E D

FEB 15 1978

EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	No. 77-1720
v.	)	
RICHARD TAXE, Appellant.	)	OPINION

Appeal from the United States District Court for the Central District of California

Before: BROWNING, GOODWIN, and KENNEDY, Circuit Judges.

PER CURIAM:

Richard Taxe was convicted of twenty counts of willful infringement of copyrights for profit, 17 U.S.C. Sec. 1(f), 101(e), 104; one count of conspiracy, 18 U.S.C. Sec. 371; and five counts of mail fraud, 18 U.S.C. Sec. 1341. He received concurrent four-year sentences of imprisonment and a $1,000 fine on each of the mail-fraud counts. He was sentenced to one year's imprisonment and a $1,000 fine for the conspiracy count and each of three of the willful infringements counts, with time to run concurrently with the mail-fraud counts. On the remaining counts he was fined $1,000 each and placed on probation.

Taxe sought under Fed. R. Crim. P. 35 to have his sentence reduced. He raised numerous

grounds, including some already considered and rejected in his direct appeal.[1] His primary argument in the present appeal is that the court abused its discretion because his violations of the copyright statute constituted a course of conduct and not separate criminal violations.

The government argues that the twenty acts of willful infringement for profit should be treated as they would be treated in a civil context.

The relevent statute is 17 U.S.C. Sec. 104:

> "Any person who willfully and for profit shall infringe any copyright secured by this title, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than $100 nor more than $1,000, or both, in the discretion of the court:***."

In United States v. Blanton, 531 F.2d 442 (10th Cir. 1975), a sound-recording case, the court affirmed a conviction of seventeen counts of willful infringement of copyrights for profit. Blanton was sentenced to six months' incarceration and was additional fined $200 on each count. That court was not presented with the argument Taxe advances here, but commented that "(T)he maximum sentence that could have been imposed on Blanton was one year imprisonment and a fine of $1,000 on each count, 17 U.S.C. Sec. 104." 531 F.2d at 444.

---

[1] United States v. Taxe, 540 F.2d 961 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977).

The legislative intent behind the Sound Recording Act of 1971 was to eliminate record piracy. To this end 17 U.S.C. Sec. 101(e) was amended to allow for criminal prosecution under 17 U.S.C. Sec. 104. To allow a series of discrete violations to merge into a "course of conduct" and be treated as a single offense would vitiate the deterrent effect of the statute.

Taxe was the key figure in a million-dollar record-piracy scheme. He copied for resale twenty separate albums, each containing copyrightable material. We need not address ourselves to the question of separate copyrightable material on the same tape or disc, or to the 1974 amendment, or the present 17 U.S.C. Sec. 506, as those matters either were dealt with on the first appeal or are irrevelant here.

The result here is consonant with prosecutions under 17 U.S.C. Sec. 104 for illegal appropriation of motion-picture property. In United States v. Wise, 550 F.2d 1180 (9th Cir. 1977), we affirmed a conviction of four counts of willful infringement of copyright for profit. The difference between copying tapes of "The Divine Miss M" and "Diamond Girl" is little different from copying sound and films of "The Exorcist" or "The Sting". Each crime had its own subject matter, its own hoped-for profit, and now its own punishment.

Taxe argues that the sentence constitutes cruel and unusual punishment and that it is disproportionate to that of a codefendent. The statute gives notice of the potential punishment. The sentence imposed is within statutory limits. Four years for willful and repeated thievery is not cruel or unusual. A codefendant who was convicted on fewer counts and who may have had a lesser role in the scheme received a lesser sentence. This disparity does not necessarily reflect adversely upon either sentence.

Other issues raised were dealt with on the direct appeal, or were never presented below and are not properly before us on a review of a Rule 35 proceeding. There was no abuse of discretion.

Affirmed.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	No. 77-1720
vs.	)	
RICHARD TAXE, Appellant.	)	ORDER

Appeal from the United States District Court for the Central District of California

Before: BROWNING, GOODWIN, and KENNEDY, Circuit Judges.

Appellant's petition for rehearing, filed February 28, 1978, has been considered by the court and is

Denied.

APPENDIX "B"

APPENDIX "C"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES-GENERAL

Case No. CR-74-800-IH Date: 2/25/77

DOCKET ENTRY:

PRESENT: HON. IRVING HILL, JUDGE

R.H. MAZZARELLA	NONE	NONE
Deputy Clerk	Court Reporter	Asst. U.S. Attorney

U.S.A. v. (DEFENDANTS LISTED BELOW)	ATTORNEYS FOR DEFENDANTS
(1) RICHARD TAXE	(1) MORRIS LAVINE
NOT present xx bond	NOT present xx retained
(2) RICHARD WARD	(2) LARRY FLAX
NOT present xx bond	NOT present xx retained

PROCEEDINGS: IN CHAMBERS:

1. For Richard Ward, Motion for Modification of Sentence filed Feb. 23, 1977 considered by the Court. Court determines that no hearing is necessary or appropriate. Said motion is ORDERED DENIED.

2. For Richard Taxe, Motion for Modification of Sentence filed Feb. 24, 1977 considered by the Court. Court determines that no hearing is necessary or appropriate. Court ORDERS Judgment modified so as to delete the imposition of costs of prosecution and the motion is DENIED in all other respects.

MINUTES FORM 6 Initials of Deputy Clerk rhm
CRIM - GEN D-M

APPENDIX "C"

APPENDIX "D"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. RICHARD TAXE, also known as Richard Taylor, doing business as Gault Industries, Datax Enterprises, Soundco Corp., Standard Tapes of Denver, Colo., Sound 8 of Atlanta, Ga., Motor Tapes of Detroit, Mich., Defendant.	)	No. CR 74-800-IH JUDGMENT AND COMMITMENT

On this sixteenth day of August, 1974 came the attorney for the government, Chester L. Brown, Assistant United States Attorney, and the defendant appeared in person and with his retained counsel,

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offenses of Conspiracy, in violation of Title 18, U.S.C., Sec. 371, as charged in Count 1 of the Indictment; Wilful Infringement of Copyright for Profit, in violation of Title 17, U.S.C., Sec. 1, 101(e) and 104, as charged in Counts 2 through 21, inclusive; and Mail Fraud, in violation of Title 18, U.S.C., Sec. 1341, as charged in Counts 22 through 26, inclusive, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED, that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years on each of Counts 22, 23, 24, 25 and 26, each count to begin and run concurrently with the others; the defendant shall become eligible for parole at such time as the Board of Parole shall determine pursuant to Title 18, U.S.C., Sec. 4208(a)(2).

IT IS FURTHER ADJUDGED that as to each of Counts 22, 23, 24, 25 and 26, the defendant shall pay a fine unto the United States of America in the sum of One-Thousand Dollars ($1,000.00).

IT IS ADJUDGED that the defendant is hereby commited to the custody of the Attorney General or his authorized representative for a period of one (1) year as to each of Counts 1, 2, 3 and 4 each count to run consecutively to the others making a total imprisonment of four years but that said four-year-consecutive term of imprisonment shall run concurrent with the term of imprisonment imposed as to Counts 22, 23, 24, 25 and 26; the defendant shall become eligible for parole at such time as the Board of Parole shall determine pursuant to Title, U.S.C., Sec. 4208(a)(2).

IT IS FURTHER ADJUDGED that as to each of Counts 1, 2, 3 and 4 the defendant shall pay a fine unto the United States of America in the sum of One-Thousand Dollars ($1,000.00).

IT IS ADJUDGED that as to each of Counts 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21, the defendant shall pay a fine unto the United States of America in the sum of One-Thousand Dollars ($1,000.00).

IT IS FURTHER ADJUDGED that as to each of Counts 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 the imposition of sentence as to imprisonment only is suspended and the defendant is placed on probation for a period of five (5) years on the conditions he observe the requirements of General Order No. 135 and the further condition that he pay the fine in such installments and at such times as the Probation Officer shall determine.

IT IS ORDERED that the defendant shall pay the entire costs of prosecution pursuant to Title 28, U.S.C., Sec. 1918(b) and that said costs of prosecution shall be paid in such installments and at such further times as the Probation Officer shall determine as a further condition of defendant's probation.

IT IS ADJUDGED that the execution of the within judgment and commitment is stayed until 3 O'clock this date, August 16, 1974, at which time the defendant shall report to the Office of the United States Marshal at Los Angeles, California.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Irving Hill
UNITED STATES DISTRICT JUDGE

FILED: August 16, 1974
EDWARD M. KRITZMAN, CLERK

By: _____
Deputy

APPENDIX "E"

CONSTITUTION OF THE UNITED STATES

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES

AMENDMENT [VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

TITLE 17, U.S. CODES, SECTION 104

"Any person who willfully and for profit shall infringe any copyright secured by this title, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than $100 nor more than $1,000, or both, in the discretion of the court."

RULES OF CRIMINAL PROCEDURE

R U L E 35.

CORRECTION OR REDUCTION OF SENTENCE

The court may correct an illegal sentence at any time any may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence with 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

As amended Feb. 28, 1966, eff. July 1, 1966.

1966 Amendment

Authorized correction of a sentence imposed in an illegal manner; changed the period from 60 to 120 days; substituted, in the second sentence, the words "entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction" in lieu of "receipt of an order of the Supreme Court denying an application for a writ of certiorari"; and added the third sentence.

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

The undersigned, being first duly sworn, deposes and says: I am and was at all times herein mentioned, a citizen of the United States and employed in the County aforesaid, over the age of eighteen years and not a party to the within above-entitled action. My business address is 732 East Washington, Los Angeles, California.

On April 18, 1978, I served the within Petition for Writ of Certiorari on the interested parties in said action by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Los Angeles, California, addressed as follows:

Solicitor General, Department of Justice, Washington, D.C. (3 copies)
United States Attorney, 312 North Spring Street, Los Angeles, CA 90012 (1 copy)
Clerk, U. S. Court of Appeals, P. O. Box 547, San Francisco, CA 94101 (1 copy)

Mitchell A. Rittler
Affiant

Subscribed and sworn to before me this 18th day of April, 1978.

Josie Jones

Notary Public in and for Said County and State